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Arizona Corporation Commission

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In the matter of:

CONCORDIA FINANCING COMPANY,  
LTD, a/k/a "CONCORDIA FINANCE,"

ER FINANCIAL & ADVISORY SERVICES,  
L.L.C.,

LANCE MICHAEL BERSCH, and

DAVID JOHN WANZEK and LINDA  
WANZEK, husband and wife,

Respondents.

DOCKET NO. S-20906A-14-0063

**RESPONDENT CONCORDIA  
FINANCE'S REPLY IN SUPPORT OF  
MOTION TO DISMISS REQUESTED  
RELIEF OF RESTITUTION AND  
ADMINISTRATIVE PENALTIES**

The Securities Division ignores the central command of both our Arizona Supreme Court and the United States Supreme Court that the right to a jury trial focuses on the remedy sought, opting instead for three assertions rejected by the United States Supreme Court: (1) the Division's argument that the Seventh Amendment does not apply to an administrative proceeding; (2) the Division's attempt to semantically employ the term "restitution" to evade the actual damages nature of the remedy sought and (3) and also the Division's argument that a statutory delegation of an action to an administrative agency ipso facto qualifies the action as a public right. And the Arizona Supreme Court has now, for decades, directed the lower tribunals of this state that courts are to follow Seventh Amendment jurisprudence and to independently determine the right to a jury trial by the remedy sought. Those courts' interpretations are binding, regardless of any mistaken contrary interpretations.

1 **I. THE UNITED STATES SUPREME COURT EXPRESSLY REJECTED BOTH THE**  
2 **PROPOSITION THAT THE SEVENTH AMENDMENT DOES NOT APPLY IN AN**  
3 **ADMINISTRATIVE PROCEEDING, AND THE DIVISION'S UNSUPPORTED**  
4 **DEFINITION OF A "PUBLIC RIGHT."**

5 In arguing that the Division acts to serve the public, the Division leaves out the United States  
6 Supreme Court's contrary definition of a public right administrative proceeding excluded from the  
7 constitutional right to a jury trial. It does not apply to an agency's self-serving description of its  
8 actions. The Division additionally relies upon and quotes the Supreme Court's opinion in *Atlas*  
9 *Roofing Co. v. OSHA Review Comm'n*, 430 U.S. 442 (1977), for the proposition that the Seventh  
10 Amendment does not apply to administrative proceedings. Again, in the same Supreme Court  
11 opinion defining a public right to the exclusion of the Division's argument, the Court additionally  
12 cautioned all readers that practitioners were misreading the limited holding of *Atlas Roofing* and that  
13 there was no sweeping exception to jury trial rights for all administrative proceedings.  
14 *Granfinanciera v. Nordberg*, 492 U.S. 33, 52-53 (1989).

15 The United States Supreme Court has defined a public right for the limited exception to the  
16 constitutional right to a jury trial. That definition is not in the Division's response; as a citation,  
17 quote, or even substantive argument. And it is not defined as simply acting for the public benefit as  
18 the Division argues with no supporting authority. Rather, the Division employs the term colloquially  
19 to argue that assigning a matter to an administrative agency displaces the jury trial right, which the  
20 United States Supreme Court has routinely rejected. "[N]or can Congress conjure away the Seventh  
21 Amendment by mandating that traditional legal claims be brought there or taken to an administrative  
22 tribunal." *Granfinanciera*, 492 U.S. at 52. The limited exception to the jury trial right for a public  
23 right proceeding is reserved to rights closely intertwined to a regulatory scheme and owned by the  
24 sovereign. *Id.* at 53.

25 In *Granfinanciera*, the Supreme Court expressly defined the public right that qualifies for an  
26 exception to the Seventh Amendment. Importantly, the Court therein repeated its rejection of an  
27 exception to the jury trial for simply assigning a statutory cause of action to an administrative  
agency. "As we recognized in *Atlas Roofing*, to hold otherwise would be to permit Congress to

1 eviscerate the Seventh Amendment's guarantee by assigning to administrative agencies or courts of  
2 equity all causes of action not grounded in state law . . . ." *Id.* at 52. Instead, the Court instructed that  
3 the exception applied only to a public right in a cause of action assigned to an administrative agency,  
4 which the Court defined as integral and unique to a detailed statutory scheme, with the operative  
5 terms being "closely intertwined with a federal regulatory program" and belonging to the  
6 government. *Id.* at 54-55.

7 The Court issued detailed rulings and explanations negating the Division's arguments. First,  
8 the Court explained the limited application of *Atlas Roofing*, the case relied upon by the Division  
9 for overbroad propositions. In Footnote 10, the Court explained that *Atlas Roofing* explored jury  
10 trials at admiralty, and employed a unique term in the unique context of that case. The Court then  
11 reaffirmed the actual test, "[t]hose cases in which Congress may decline to provide jury trials are  
12 ones involving *statutory rights that are integral parts of a public regulatory scheme.*" *Id.* at 55 n.10  
13 (emphasis added). Within the case itself, the Court held that Congress could not eliminate a jury trial  
14 right for a fraudulent conveyance action in bankruptcy brought by the trustee, as that action was not  
15 the controversy within the regulatory proceeding, but "arose out of" the proceeding as  
16 "quintessentially suits at common law that more nearly resemble state-law contract claims." *Id.* at  
17 56.

18 As stated by the Court, neither creation of a statute nor delegation to an administrative agency  
19 can eliminate a jury trial right. *Id.* at 51 ("Congress may only deny trials by jury in actions at law,  
20 we said, in cases where 'public rights' are litigated . . . ."). And, examination of the Arizona  
21 Securities Act demonstrates that the duplicative causes of action therein for contractual damages are  
22 not a public right, and do not belong to the State. Both are necessary findings to deprive Concordia  
23 of its jury trial rights. Rather, the ASA authorizes the identical private cause of action as the Division  
24 is exercising, with the identical contractual damages provision. Title 44, section 2001 provides for a  
25 private cause of action alleging a violation of either A.R.S. §§ 44-1841 or -1842, with damages  
26 available calculated as:  
27

1 the consideration paid for the securities, with interest, taxable court costs and  
2 reasonable attorney fees, less the amount of any income received by dividend or  
otherwise from ownership of the securities

3 A.R.S. § 44-2001(A). This definition parallels the definition of “damages” found in the  
4 Commission’s rules, and sought in this parallel proceeding against Concordia, also alleging  
5 violations of A.R.S. §§ 44-1841 or -1842:

- 6 a. Cash equal to the fair market value of the consideration paid, determined  
7 as of the date such payment was originally paid by the buyer; together  
8 with  
9 b. Interest at a rate pursuant to A.R.S. § 44-1201 for the period from the  
date of the purchase payment to the date of repayment; less  
10 c. The amount of any principal, interest, or other distributions received on  
11 the security for the period from the date of purchase payment to the date  
of repayment.

12 A.A.C.R14-4-308(C)(1).

13 The sought after damages remedy is not a right belonging exclusively to the State. That alone  
14 negates the Division’s argument. Additionally, these are claims for money judgments on actions not  
15 integral to a regulatory scheme. The action alleges unregistered sales, not failures within the detailed  
16 requirements of the ASA, and tellingly, not any ongoing conduct.

17 **II. THE DIVISION CANNOT EVADE WHAT IT IS SEEKING: A MONEY**  
18 **JUDGMENT IDENTICAL TO THAT AVAILABLE IN A PARALLEL PRIVATE**  
19 **CAUSE OF ACTION.**

20 The Division attempts to dismiss binding United States Supreme Court instructions on  
21 identifying actions to which the Seventh Amendment jury trial applies in two ways, both rejected  
22 by even more Supreme Court jurisprudence. First, the Division attempts to distinguish each case,  
23 including those also involving securities actions involving the SEC by asserting that if it did not  
24 involve an action before an administrative agency, it does not apply. [Resp. at 11-13.] However, as  
25 identified above, the United States Supreme Court expressly rejected as unconstitutional the  
26 Division’s assertion that simply assigning a statutory cause of action to an administrative agency  
27 may eliminate the jury trial right.

1 The Division secondarily attempts to evade the Supreme Court's commands as to the Seventh  
2 Amendment by claiming that Concordia is fixated on the term "damages" and that the Commission  
3 may order what it calls "restitution." [Resp. at 8-9.] The Motion to Dismiss is not hinged on the use  
4 of the word "damages" in the Commission's rules, but instead upon the sought money judgment and  
5 the United States Supreme Court's express use of the term damages for requests for money  
6 judgments which are legal actions, to which the jury trial right is preserved and applies. "[T]he relief  
7 sought here -- actual and punitive damages -- is the traditional form of relief offered in the courts of  
8 law." *E.g., Curtis v. Loether*, 415 U.S. 189, 196 (1974) (analyzing the jury trial right); *City of*  
9 *Monterey v. Del Monte Dunes*, 526 U.S. 687, 710-11 (1999) (jury trial right attached to statute  
10 sounding in tort with compensatory relief "like ordinary money damages").

11 And, as to the Division's employment of the term "restitution," that again evades the United  
12 States Supreme Court's definition of that term contrary to any request in this proceeding, and the  
13 United States Supreme Court's rejection of simply using the term "restitution" to what is in fact  
14 actually a request for damages. As to that first point, the United States Supreme Court has defined  
15 "restitution," as that term is employed as an exception to the Seventh Amendment to mean  
16 disgorgement or money "incidental to or intertwined with injunctive relief." *Chauffeurs, Teamsters*  
17 *& Helpers, Local No. 391 v. Terry*, 494 U.S. 558, 570-71 (1990). While the Commission may apply  
18 for such remedies in other matters, it has not done so here. Throwing around that term is irrelevant  
19 to Concordia's rights, because labeling a sought remedy as "restitution" does not transpose a legal  
20 action into an equitable action where a plaintiff seeks a "judgment imposing a personal liability upon  
21 a defendant to pay a sum of money." *Great-W. Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204,  
22 212-14 (2002).

23 **III. THE DIVISION RELIES ON COURT OF APPEALS' OPINIONS NEGATED BY**  
24 **BOTH SUPREME COURTS, AND ONE NOT DISCUSSING DAMAGES.**

25 The Division relies upon three Court of Appeals' opinions for the proposition that if a statute  
26 did not exist at the time of common law, then nothing in the statute implicates a jury trial right. There  
27 are fundamental problems with that argument. First, such rulings would contravene the Arizona

1 Supreme Court's commands that courts review the actions as whether they are legal or equitable and  
2 follow the Seventh Amendment to determine the jury trial right. Second the cited decisions  
3 mistakenly reviewed the test for a jury trial right in a criminal trial under a different provision of the  
4 Arizona Constitution.

5 The United States Supreme Court has expressly held several times that under the Seventh  
6 Amendment, it does not matter whether a statute did not exist at common law.

7 It is undisputed that when the Seventh Amendment was adopted there was no action  
8 equivalent to § 1983, framed in specific terms for vindicating constitutional rights. It  
9 is settled law, however, that the Seventh Amendment jury guarantee extends to  
statutory claims unknown to the common law, so long as the claims can be said to  
"sound basically in tort," and seek legal relief.

10 *Del Monte Dunes*, 526 U.S. at 709. This is not a unique holding either, as the Court has explained  
11 that examination for common law antecedents is not an exercise in looking for identical statutes or  
12 actions.

13 Since Justice Story's time, the Court has understood "Suits at common law" to refer  
14 "not merely [to] suits, which the *common* law recognized among its old and settled  
15 proceedings, but [to] suits in which *legal* rights were to be ascertained and determined,  
in contradistinction to those where equitable rights alone were recognized, and  
equitable remedies were administered."

16 *Feltner v. Columbia Pictures TV*, 523 U.S. 340, 347-48 (1998).

17 In the decisions cited by the Division, the courts did not examine the Arizona Supreme  
18 Court's instructions to look to the Seventh Amendment, or to the United States Supreme Court's  
19 seventh amendment holdings. Instead, they doubled their mistakes, by concentrating on Arizona's  
20 separate test under Arizona Constitution Article 2, Section 24 for a jury trial right in criminal  
21 proceedings, which is not implicated here.

#### 22 IV. CONCLUSION.

23 "[T]he Arizona Constitution requires greater protection of the right to trial by jury than does  
24 the federal constitution." *Derendal v. Griffith*, 209 Ariz. 416, 419, ¶ 6 (2005). In contravention to  
25 that, the Division seeks an exception to the Seventh Amendment rejected by the United States  
26 Supreme Court and the Arizona Supreme Court's adoption of the United State Supreme Court's  
27

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seventh amendment jurisprudence. The actions for damages and penalties against Concordia are claims for money damages, duplicative of the private right of action in the same statute. Assigning this to the Commission does not change the nature of the action, or the Arizona Constitution. Those claims must be dismissed.

RESPECTFULLY SUBMITTED this 23<sup>rd</sup> day of November, 2016.

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